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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 187

FRED ISAACS AND HARRY ISAACS

Petitioners

vs.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

BENEDICT DEINARD
MELVIN H. SIEGEL
The Tenth Floor
512 Nicollet Avenue
Minneapolis 2, Minnesota
Counsel for Petitioners Fred Isaacs and Harry Isaacs

Hayward-Court Brief Ptg. Co., Mpls. 15, Minn.

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ARGUMENT

The Government's Brief in Opposition merely serves to demonstrate the importance of the questions presented and the conflict between the rulings below and the decisions of this Court.

1. The Government makes no effort to defend the theory on which the court below affirmed the convictions of the Isaacs (Pet., pp. 17-19). Instead, it argues that, to give a "guise of legitimacy" to their transactions, the "insiders" required the aid of many "outsiders" engaged in "legiti-

mate enterprises" (Br., p. 13).[1], and that the Isaacs and other "outsiders", in turn, became both "knowing" and "interested" participants in the "larger plan" of the "insiders", because each "knew that his success depended on the fraudulent control of the corporation". (Br., p. 15).

The short answer is that, if the success of the scrap transactions depended on the fraudulent exercise of such control in the disposition of scrap, this gave the Isaacs no reason to know of, or interest in aiding, fraud in the transfers of *other* surplus property or the employment of *other* "outsiders" to give such transfers the guise of legitimacy. Petitioner Harry Isaacs acquired the Midcontinent properties without fraud, the trial court held as a matter of law (Pet., pp. 7-8), and understood that others had made similar purchases, as appears from the statement of his quoted by the Government (Br., p. 15).[2] In fact, it is not even claimed that there was fraud in the transfer of surplus property, other than scrap, between mid-1951, when the scrap transactions commenced, and March, 1954, when Towey purchased certain real estate in another's name.

The vice of the Government's argument is not in its appraisal of the evidence, but in the basic legal criteria advanced for determining guilt on a charge of an over-all conspiracy. On the Government's theory, the "wide-sweeping

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[1] In this reply brief, the petition of Fred Isaacs and Harry Isaacs in No. 187 is cited as "Pet.", the joint appendix to this petition and those in Nos. 188, 189, and 194, as "Pet. Jt. App.", and the Brief for the United States in Opposition as "Br.".

[2] In the mentioned statement (Br., p. 15), Harry Isaacs referred to the Northern States Power Company, which acquired the Transit Company's power plant (V. 37, pp. 29-32, 53-4), and a resident of St. Paul, who purchased certain real estate from the Transit Company (V. 31, pp. 7-8). Neither was named as a defendant or co-conspirator in the Indictments or bill of particulars or accused of any fraud at the trial. Assuming that the "problematical" or "hypothetical" question asked by Fred Isaacs on the same occasion (V. 24, pp. 132, 58) was an admission of fraud in the dealings between American Iron and the Transit Company, it does not refer to transactions between the Transit Company and any other "outsider".

nets of conspiracy prosecutions" would extend to new fields previously excluded from its reach, contrary to the warning in *Grunewald v. United States*, 353 U. S. 391, 404 (1957). On its theory, evidence of illegality in the transactions between an "insider" and any "outsider" normally engaged in a "legitimate" enterprise would always support a finding of "knowing and interested" participation by such "outsider" in a "larger plan", involving other illegal transactions of the "insider" with other "outsiders" also engaged in "legitimate" enterprises. On this basis, conspiracy prosecutions could always be used to transfer evidence of guilt *from one defendant to another in one proceeding* whenever a corporate or public officer or other fiduciary were charged with using "inside" influence for private gain in granting a number of contracts or licenses to several "outsiders" engaged in "legitimate" enterprises, a result heretofore deemed forbidden by this Court's decision in *Kotteakos v. United States*, 328 U. S. 750 (1946). Cf. *Canella v. United States*, 157 F. 2d 470 (C. A. 9, 1946).

The Government's theory, indeed, would in principle permit this to be done in every case to which *Kotteakos* has heretofore been held to apply. For the success of the scrap transactions (and that of all others tried below) depended not merely on "inside" control by the Transit Company's officers. It depended at least as much on concealment of the alleged abuse of their fiduciary obligations. "Secrecy and concealment are essential features of a successful conspiracy" in all cases. *Blumenthal v. United States*, 332 U. S. 539 (1947). But active participation by one conspirator in concealment for one purpose does not of itself afford a basis for a finding that he had knowledge of additional objectives of other conspirators in such concealment, as this Court held in *Ingram v. United States*, 360 U. S. 672 (1959), or a purpose to further any such additional objec-

tives. In *Kotteakos* itself, the Government conceded that an interest in concealing the common figure's practice of processing fraudulent applications by ostensible home owners for Federal home improvement loans, though shared by each of the applicants, was insufficient to establish the requisite common purpose of a single, over-all conspiracy.[3]

Nothing in *Blumenthal v. United States, supra*, on which the Government relies, supports its theory. There, "each" of the "salesmen" whose conviction was affirmed "knew" that "elaborate arrangements" were "made not merely for his sales, *but also for others*" (332 U. S. at 555, n. 16; italics supplied), to give all the illegal sales the "guise of legitimacy" (*id.* at 553-5, n. 14), and, as salesmen, each "intended to aid the owner" in selling a "larger" quantity.[4] *Id.* at 559. As shown, the "guise of legitimacy" the-

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[3] In that case, the Government conceded that the evidence showed several conspiracies, rather than one, even assuming that each knew the common figure, Brown, was processing fraudulent applications for others (Brief for the United States in *Kotteakos v. United States*, Nos. 457, 458, October Term, 1945, p. 21), and stated: "So long as Brown was able to carry on without detection, each group was interested only in its immediate venture" (id., p. 22). This Court, similarly, approved the statement of the Court of Appeals in that case that "Thieves who dispose of their loot to a single receiver—a single 'fence'—do not by that fact alone become confederates". *Kotteakos v. United States, supra*, at 755.

[4] In *Blumenthal*, two carloads of whiskey were distributed and sold by an unidentified owner at over ceiling prices, under an arrangement whereby title to both carloads was ostensibly taken in the name of an established wholesale dealer, and the whiskey was then sold in small lots to ultimate purchasers through several salesmen. The salesmen each knew that the whiskey he sold was part of "carload" lots and commenced soliciting customers almost "simultaneously". Each salesman made arrangements with the purchasers to furnish the purchasers with invoices, at the same below-ceiling prices, to comply with the record-keeping requirements of local law, and each salesman received a check from the purchaser for the invoiced amount and an additional secret sum in cash, for remittance to the owner. There was thus evidence that each salesman knew the quantity of whiskey he sold was only part of "carload" lots, followed a "singularly set pattern" in making his respective sales, and personally participated in carrying out the "elaborate arrangements" designed to conceal the violation of price ceilings in all the sales, and thus knew that "*other salesmen* paralleling his efforts *were making sales similar to his*", as "part of a larger common enter-

ory, as sought to be applied here, would extend to all allegedly illegal dealings between an "insider" or any "common figure" and "outsiders" regularly engaged in "legitimate enterprises," and thus would substantially limit, and indeed wholly undermine, the principle enunciated in *Kotteakos*.

2. The Government, for the third time, has changed its position on the basic issue whether the adoption or procurement of the Minneapolis Conversion Ordinance was a part of the alleged scheme to defraud, and now relies on a theory which, as the court below concluded and the Government nowhere controverts, was not supported by any evidence.

At the trial, the Government advanced two theories on this issue. The first was that the enactment of the ordinance was itself fraudulent. The Government stated at the trial, as it now does (Br. pp. 16-17), that the ordinance was not fraudulent as between the Transit Company and the City of Minneapolis. But, as the Government now fails to mention, it originally claimed, in particulars given in advance of trial and in the course of the trial itself that, as between the company and American Iron, the "enactment of this ordinance" and its acceptance by the Transit Company was "fraudulent" and "unlawful," in that the company, by thus obtaining at its own expense a release from the company's franchise obligations to repave, thereby procured the release of American Iron from its contract obligations to do so, without any consideration (see Pet., pp. 11-12).

The second theory which the Government advanced at the trial, but which it nowhere mentions now, was that

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prise dependent on the carefully evolved arrangements to give the sales the guise of legitimacy". *Blumenthal v. United States, supra*, at 553-5, n. 14 (Italics supplied).

American Iron had been relieved of such obligation *before* the enactment of the ordinance on October 30, 1953, because allegedly there never had been any good faith intention to enforce the removal contracts between the Transit Company and American from the inception of the letter agreement of 1951 and the first formal removal contract of February, 1952 (see Pet., p. 12). In this view, the financial burden assumed by the Transit Company under the conversion ordinance in 1953 was a result of a prior fraud in not intending to enforce the removal contracts from their inception (see Pet. Jt. App., p. 49).

In final rebuttal argument, however, after the close of the trial, the Government abandoned the first theory, conceding that the "conversion ordinance wasn't a part of any scheme" to defraud (see Pet., p. 13, n. 4), and relied solely on the second theory, that the formal "(removal) contract didn't mean anything" when it was first executed "on February 11, '52" (V. 68, pp. 23-4, 65-6). The trial court nevertheless submitted both theories to the jury (Pet., p. 14).

In the Court of Appeals, the Government reasserted both theories. In particular, as the Government omits to mention, it withdrew the concession made in final argument in the trial court, that the ordinance wasn't a part of any scheme to defraud. While admitting that it had "conceded there was no fraud" in the ordinance in its "closing argument", in the trial court, the Government then claimed that in fact "there *was* fraud in the *procurement* of that ordinance", and that "*We* were in error in the (trial) court below, not the court", thus conceding that fraud in the procurement of the ordinance was in fact submitted to the jury (Transcript of Oral Arguments of Counsel, p. 128, ital. supplied; see Pet., p. 13, n. 4).

The court below, however, concluded that "there was no evidence of fraudulent conduct" in either the "adoption" or "procurement" of the "conversion ordinance", a conclusion which the Government nowhere controverts or even mentions, but held that this issue had never been tried, and affirmed the conviction on the sole ground that there was evidence to support the second of the Government's two theories. The court below said:

> "But fraud in the actual procurement or adoption of the ordinance was never an issue—no one contended that it was—and indeed the Government expressly disavowed any fraudulent conduct between the Company and the city. The Government's theory was, and this became a major issue, that *Ossanna entered into an arrangement with the Isaacses whereby they would ostensibly discharge the obligations of the Company* to the city under the franchise agreement then in effect, *well knowing such arrangement would never be carried out;* that Isaacs' company, American Iron, would never be called upon or required to discharge its obligations under the contract, *and that the Company* would *later* of *necessity* be forced to further obligate itself to the city to secure removal of its property from the streets, to repave and otherwise improve the streets formerly occupied by Company property in order that the conversion program could actually be put into operation. It was in this factual setting that the Government contended that the adoption of the conversion ordinance was in fact a part of the scheme and device to defraud." (Pet. Jt. App., p. 49; italics supplied).

The court below also concluded that this theory was the only one submitted to the jury by the trial court's instructions, when read in the light of the issue litigated, as clearly appears from the very portion of its opinion quoted by the Government (see Pet. Jt. App., p. 50).

Now the Government reverts to the first of its original two theories, that of fraud in the enactment of the ordinance itself, without even mentioning that the court below had rejected it and had affirmed the conviction on the second theory.

The Government states:

> "As noted in the Statement, American (the Isaacs company) assumed the obligation of resurfacing certain Minneapolis streets torn up by the removal of rails. But, by a *later agreement* between the city and the transit company, *in the form of an ordinance*, the city undertook to do the necessary repaving, at a cost of $922,790 to the transit company, which also agreed to expend $300,000 in special removal work. (Pet. J. App., 87-100). Thus American was never called upon to repave the streets. *It was the government's theory that, by effectively shifting the financial burden of resurfacing from American to Transit, this agreement made it possible for American to obtain scrap at less than normal cost.*" (Br., p. 16; italics supplied.)[5]

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[5] The Government's present statement of its position is a reasonably accurate summary of the first of its two theories advanced in the trial court, as appears from the portions of the record set forth in the Petition (pp. 11-13). In the portion of the record which the Government cites to support its summary, however (Br., pp. 16-17, n. 11), the Government, in its closing argument to the jury, abandoned that theory and relied solely on its second theory. There, Government counsel, while conceding that the conversion ordinance wasn't part of any scheme to defraud, pointed to the fact that the conversion ordinance did not entirely relieve the Transit Company of its franchise obligations to remove and repave in paved streets, but left the Transit Company the obligation to do so as to so-called "special work" up to a cost of $300,000.00 (Pet. Jt. App., pp. 87, 90-1). Government counsel argued that, if the "(removal) contract meant anything", the Transit Company should have required American Iron to perform such work but failed to do so. This, he argued, along with failure to require American Iron to repave before the enactment of the conversion ordinance (V. 68, pp. 23-4), confirmed that the removal contracts had never meant anything at all. As no issue is raised as to the sufficiency of the evidence to sustain a finding of fraud on this theory, it suffices to say that in defense petitioners claimed below that the Transit Company's repaving obligations reserved by the ordinance were not delegable, in that the ordinance

This was indeed the first of the two theories submitted by the trial court to the jury, as the portions of the charge emphasized by the Government itself plainly show. The trial court, as the Government correctly points out, attributed to the Government the argument that American Iron was "relieved of its obligation" to repave "by the arrangement allegedly made by the defendant Ossanna in fostering the City Ordinance of October 30, 1953", and expressly invited the jury to determine whether "the ordinance" itself was "a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract, Government's Exhibit B-Z?" (Br., p. 17; see also Pet., pp. 14-15). If, contrary to the Government's concession in the Court of Appeals this instruction did not in terms submit an issue as to fraud in the "procurement" of the ordinance, as the Government now asserts (Br., p. 17), it certainly submitted an issue of fraud in its "adoption". Yet, as the court below concluded and the Government here does not controvert, there was no evidence to support a finding of fraud either in the "procurement" or "adoption" of the ordinance.

Where, as here, several "different and conflicting" positions are advanced by the Government in a criminal case with respect to instructions to the jury on a basic issue, it cannot be assumed that the jury was "properly guided". *Bollenbach v. United States*, 326 U. S. 607, 613 (1946). To permit the convictions to stand would be to ignore the vital

required the Transit Company to retain its own forces for the city's use in any "continuation" by the city of the remaining work (Pet. Jt. App., pp. 90-1), that, before the ordinance, the requisite directives by public officials to perform such work were normally deferred, in accordance with long established practice, so as to coincide with a public highway paving program (V. 20, p. 29), and that in the only two instances in which such directives were given before the ordinance, American Iron either did the work or was not required to do so, because the street involved was not listed in the removal contract then in effect (Pet. Jt. App., pp. 102-3).

importance of clear instructions and supporting evidence on such issues, and to invite appellate courts to search for some ground of affirmance of a conviction once obtained, however untenable, in plain disregard of this Court's specific admonition in *Bollenbach* (see Pet., p. 23).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BENEDICT DEINARD
MELVIN H. SIEGEL
The Tenth Floor
512 Nicollet Avenue
Minneapolis 2, Minnesota
Counsel for Petitioners Fred Isaacs and Harry Isaacs